

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1070

To be argued by
LAWRENCE STERN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

Appellee,

-against-

77-1070

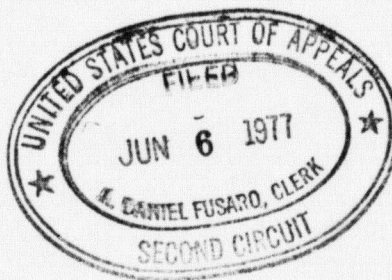
VICTOR CUMBERBATCH,

Defendant-Appellant

-----X

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT



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POINT I

THE GOVERNMENT'S RETROACTIVITY ANALYSIS HAS NO BEARING ON THIS CASE, WAS NOT RAISED BELOW, AND IS INCORRECT.

Appellant is in no different position from the appellants in Mauro itself, Cyphers, and Ford. He raised the IAD objection to his indictment prior to this Court's decision in Mauro and prior to his trial. This Court has applied Mauro to Ford, a case that followed Mauro in decisional order, but where the IAD objections had been made prior to the Mauro decision and prior to the trial in that case. This Court has, of course, already gone further than that and applied Mauro to Cyphers (Ferro) when the issue was raised for the first time on appeal and the defendant did not know prior to trial that a detainer had been lodged against him. The Court said that the IAD, by its own terms, would be liberally construed to effectuate its purposes, (Cyphers, at 1745), and that transfers in violation of the IAD (including those by writ), again by its own terms, "shall not be of any further force or effect". (Id. at 1744) Thus, appellant submits, this Court has already decided the retroactivity question against the government in appellant's case and those like his.

The government conceded this below when it failed to present this argument to Judge Palmieri and failed to appeal his dismissal of the first indictment under the imprimatur of Mauro. The only argument offered by the government then was that Mauro was wrongly decided, and they were aware that

Judge Palmieri could not refuse to dismiss the first indictment on that ground. Now they ask this Court to hold that Judge Palmieri was wrong in dismissing the first indictment for reasons they never presented to him, and although he adopted their own maneuver of a second indictment as the only recourse to avoid Mauro and the IAD.

The government, no less than a criminal defendant, is bound by what amounts to an affirmative waiver of objections. This is not a situation where, as the government argues at P. 18, footnote, objections were presented by the party and ignored by the Judge; here the Court was never presented with the objection and the government decided on a course of action which waived the very objection it now seeks to have this Court sustain.

Were retroactivity analysis arguable in this case, it would have to fail. This Court in Mauro and Cyphers and Ford was interpreting a statute not just to create some new rules to better effectuate its purpose, but was interpreting a statute whose entire meaning and purpose had been evaded and eroded by the government's reliance on its own sua sponte assumption that the purposes and meaning of the IAD, although approved by Congress, did not apply to it or need not apply to it if it simply used a writ instead of a detainer to shunt people back and forth. Any reading of the statute, its purposes and its history, would put those responsible for the transfer of prisoners on notice that Congress meant to impose limits on

that process. It was clear to this Court that, "our interpretation of the Detainers Act should reflect Congress' purpose." United States v. Ford, 550 F. 2d 732, at 741. That the government followed a different practice not in accord with Congressional purpose or the language of the statute is not the kind of "reliance" which forestalls "retroactive" application of a federal statute.

None of the cases cited by the government would support total, retroactive avoidance of a statute that is to be "liberally construed" in favor of its purposes. Those cases depart from the general principle that construction of a federal statute will be applied retroactively. United States v. Estate of Donnelly, 397 U.S. 286 (1970); Ferguson v. United States, 513 F. 2d 1011, 1012 (2d Cir., 1975) (Kaufman, C.J.) The cases cited by the government depart from that general rule only in circumstances where (1) a new rule is being announced which adds a requirement nowhere stated in statutory or judicial precedent or practice, and where (2) the old rules or practice under the statute were not contrary to its purpose, but merely did not go far enough in effectuating that purpose, and where the Courts were reasonably assured that the basic requirements of the statute had been carried out. United States v. Kaylor, 491 F.2d 1133 (2d Cir., 1974) (the YCA had been observed, but not explicitly); Halliday v. United States, 394 U.S. 831 (1969) (the basic purpose of Rule 11 practice, to determine voluntariness of a plea, was always in effect and remedies were always retro-

active, whereas McCarthy v. United States involved a departure from judicial practice}; United States v. Peltier, 422 U.S. 531 (1975) (Border Patrols acted on federal statute supported by administrative regulations and "continuous judicial approval"; and retroactivity of exclusionary rule, not the statute, was at issue).

Thus, for the six years prior to Mauro, the government has had the statute with its language and its stated purposes (which includes enabling trial preparation with counsel in the sending or receiving jurisdiction, Ford, supra, at 740*), and it was on notice certainly as early as Esola v. Groomes, 520 F. 2d 830 (3d Cir., 1975) (Cited in Mauro) that its interpretation was being attacked. Also the issue was being raised in the Southern District of New York in 1975 and 1976. Also, the government should have been aware of the presumption against reading the IAD into superfluity, which is also a "time honored" principle of the law, no less that the government's writ.

Finally, the government attempts to frighten the Court by a parade of horrors and the treatment of this case as a post-conviction writ. This is not such a case. The government's pure speculation about a rash of 2255 applications has nothing to do with a case on direct appeal where the issue in question, the dismissal of an indictment, was raised prior to trial and, indeed, prior to this Court's decision upholding appellant's contentions in his motion made before the trial Court.

* Appellant asked to remain in the Southern District at MCC for the purpose of trial preparation in June of 1976. This Court has not required showing of specific prejudice in Mauro, Cyphers, or Ford.

POINT II

THE PROVISIONS OF THE INTERSTATE AGREEMENT ON DETAINERS BARS PROSECUTION AS TO CRIMES ALLEGEDLY COMMITTED IN THE SAME TRANSACTION AS THAT WHICH WAS THE SUBJECT OF THE PRIOR INDICTMENT WHICH WAS DISMISSED "WITH PREJUDICE".

It is clear and it is conceded by the government that there was but one transaction involved in both indictments, 73 Cr 319 and 76 Cr 1076: a bank robbery.

The question is squarely before the Court whether, when the government ignores and circumvents the intent of Congress, which made the United States a party to the IAD, it can blithely avoid the sanctions of law by calling upon a "rainy day" accusation it has up its sleeve to take the place of an indictment properly dismissed because of its unlawful actions. In particular, can the government withhold from an indictment certain crimes necessarily committed during a particular transaction just in case there is an acquittal or a dismissal?

This Court, in dictum, to be sure, in United States v. Jacobson, 547 F. 2d 21 (2d Cir. 1976) answered that question when it said,

...it would be highly questionable to prosecute a conspiracy charge in addition to and separately from any substantive offense committed as part of the conspiracy.

That is precisely the instant case. The government elected not to include any conspiracy count in the 1973 indictment, perhaps holding it in readiness in case the other

counts in that indictment failed for one reason or another, as, in fact, they have. In 1976, the government unearthed the conspiracy count along with a firearms count to salvage the results of six years of blatant disregard of the provisions and rationale of the IAD.

The government cites United States v. Papa, 533 F. 2d 815 (2d Cir. 1976) as authority for its argument. In fact, that case involved not a single transaction, such as in the instant case, but two separate conspiracies with Papa allegedly at the forefront in both. The fact is that the existence of two separate "transactions" was the cornerstone of that decision. This Court held there that a guilty plea as to one conspiracy did not bar prosecution on the second conspiracy. That case is the natural predecessor to Appellant's position in the instant case.

It is important here to set to rest the totally untrue assertions by the government that the appellant in any way delayed the instant case, and is, therefore, not entitled to benefit from the provisions of the IAD. The relevant chronology of this matter is as follows:

1. April 12, 1973: Indictment 73 CR 319 filed.
2. October, 1973: Appellant pleads not guilty.
3. December 18, 1973: Government files Notice of readiness.
4. May 1975: Trial of co-defendant Estramera.
(Appellant on trial in State Court.
Government did nothing to secure

appellant's presence during this eighteen-month period for trial)

5. September 9, 1975: Robert Bloom assigned as counsel. Judge Duffy (and Bloom) on trial until November, 1975.
6. April 13, 1976: Trial date (June 7, 1976) set without in any way consulting Bloom.
7. April 26, 1976: Letter from Bloom to Judge Duffy indicating that June 7, 1976 is a date for which he has a commitment, but suggesting case be tried prior to June 7, by assignment to another judge, if necessary. (These facts omitted from government's brief) See United States v. Ford, 550 F. 2d 732, at 735 and 743, citing United States v. Drummond, 511 F. 2d 1049, both Second Circuit cases.
8. June 7, 1976: Conference; Bloom on trial, as expected; case adjourned to July 13, 1976.
9. June 10 through June 15, 1976: Bloom asks AUSA Epstein and Judge Duffy to keep appellant in the Southern District of New York, at MCC, to expedite trial preparation. Both AUSA and Judge Duffy refuse to do so.
10. August 12, 1976: Motion to dismiss based on violation of IAD.

It is absolutely clear from the above chronology that at no time nor in any way did appellant or his attorney attempt to delay this case. Everything done by counsel attempted to expedite the trial. What is there that the government can point to that appellant or his counsel did that caused any delay?

The government brief indicates (G. 9) that counsel filed no motions and made no written demands for pre-trial discovery.

As to motions, the only matter of significance was settled at the September 9, 1975 conference where it was clearly understood on the record that there would be a Simmons hearing prior to trial.

As to discovery, counsel shared office space with counsel for co-defendant Estramera and was quite familiar with the material in the case as to all defendants. But, in any event, whatever counsel requested on papers or informally, no delay whatsoever was caused by any request by counsel for materials or for any other reason. Any finding or assertion to the contrary is totally without basis and demonstrates on the part of the trial judge a willingness to adopt the position of the government attorney without questioning the bases for that position, which is an attitude discussed in appellant's main brief.

At no time was appellant offered a "speedy trial" in September of 1975, as argued by the government (G. 23). Judge Duffy was unavailable at that time to try the case and the government did not persuade him to reassign the case. Nor was the appellant "offered" a speedy trial in June of 1976. What happened there was a unilateral setting of an unacceptable trial date which led defense counsel to ask to advance, not delay, the trial date.

It is respectfully requested that, if the Court regards the issue of delay as significant, the Court demand of the government specific assertions as to how and when appellant or his counsel delayed the proceedings.

POINT III

THE GOVERNMENT'S BRIEF IMPROPERLY
RELIES ON INAPPOSITE CASES WITH
REGARD TO THE SUFFICIENCY OF THE
PROOF AS TO 18 USC 924 (c).

While it is true that an instrument may be shown to be a firearm without the necessity of producing the instrument in Court, there must be certain minimum requirements as to the nature and quantum of the circumstantial proof as to the issue.

In the instant case, an expert for the government simply looked at the bank surveillance photographs and concluded that the instrument depicted therein was not an imitation (despite the fact that the holder of the instrument is not even holding the purported trigger mechanism, but is instead holding what would be the ammunition clip of the instrument). The expert relied on the fact that he personally was not aware that there was ever a mass-produced replica of the weapon in question.

In United States v. Liles, 432 F. 2d 18 (9th Cir. 1970), relied upon by the government, the proof was that one witness, an experienced firearms salesman, had (a) held the weapon, (b) looked down the barrel, (c) looked at the cylinder, and (d) heard that defendant ask to look at live ammunition, although he did not buy any; and that a second witness, a friend of Liles, had seen the weapon up close, and that Liles had told him, in effect, that the instrument there was an operable gun. That case is so totally different from the instant case that it

serves as a standard as to the kind of circumstantial proof that must be required when the instrument is not available for actual examination.

The government also cites United States v Samson, 533 F. 2d 721 (1st Cir. 1976). In that case, the Court does not in any way discuss the facts so that they may be examined and compared with the instant facts. The case simply stands for the proposition that circumstantial proof may be sufficient in certain circumstances.

The cases cited by the government (G. Brief, p. 31, footnote) that hold that circumstantial evidence may be sufficient to prove that a substance never scientifically tested and presently unavailable, show that the proof as to those matters must be much greater than the proof offered in the instant case. The proof herein shows that, with the presence of what appears to be other instruments which were operable guns, the instrument in question could have been an imitation gun or a real gun.

CONCLUSION

FOR THE ABOVE STATED REASONS, AS WELL AS THOSE SET FORTH IN THE MAIN BRIEF, THE JUDGMENT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED WITH PREJUDICE OR, IN THE ALTERNATIVE, A NEW TRIAL ORDERED, OR THE CASE SHOULD BE REMANDED FOR RESENTENCING.

Respectfully submitted,

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